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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

JEFFREY A. UTTECHT,

Petitioner,

v.

CAL COBURN BROWN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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FORMER CAPITAL CASE

QUESTION PRESENTED

In *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986), this Court held that a state trial judge may, without setting forth any explicit findings or conclusions, remove a juror for cause when the judge determines the juror's views on the death penalty would substantially impair his or her ability to follow the law and perform the duties of a juror. The Court further held that a federal habeas court reviewing the decision to remove the juror must defer to the trial judge's ability to observe the juror's demeanor and credibility, and apply the statutory presumption of correctness to the judge's implicit factual determination of the juror's substantial impairment.

Did the Ninth Circuit err by not deferring to the trial judge's observations and by not applying the statutory presumption of correctness in ruling that the state court decision to remove a juror was contrary to clearly established federal law?

PARTIES

The petitioner is Jeffrey A. Uttecht, the Superintendent of the Washington State Penitentiary. Mr. Uttecht is the successor in office to John Lambert who was the respondent-appellee in the Ninth Circuit. The respondent is Cal Coburn Brown.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of Jeffrey A. Uttecht, the Superintendent of the Washington State Penitentiary, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the United States Court of Appeals for the Ninth Circuit, issued upon the denial of a timely petition for rehearing en banc, is reported at *Brown v. Lambert*, 451 F.3d 946 (9th Cir. 2006) (Pet. App. 1a–41a). The order of the United States District Court for the Western District of Washington is unpublished. Pet. App. 43a–91a. The Washington Supreme Court's opinion affirming Brown's conviction and sentence on direct appeal is reported at *State v. Brown*, 132 Wash. 2d 529, 940 P.2d 546 (1997) (Pet. App. 92a–221a).

JURISDICTION

The court of appeals first entered its opinion December 8, 2005. Pet. App. 1a. The court of appeals entered an amended opinion, and denied a timely petition for rehearing *en banc*, June 19, 2006. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The sixth amendment to the United States Constitution provides, in relevant part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ." U.S. Const. amend. VI.

28 U.S.C. § 2254(d) provides:

> "(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(e)(1) provides:

> "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence."

STATEMENT

Respondent Cal Brown raped and tortured an innocent woman for two days before killing her and dumping her body in a parking lot. Brown was convicted of aggravated first degree murder and sentenced to death. During jury selection, the trial court dismissed a juror because his answers during voir dire persuaded the judge that the juror's views on the death penalty would prevent or substantially impair the juror from faithfully and impartially applying the law. Defense counsel did not object to the juror's removal. The Ninth Circuit Court of Appeals, over the dissent of five judges who would have granted petitioner's motion for rehearing en banc, overturned the death sentence because it concluded that the trial court judge erred in removing the juror.

1. Background

"Jurors . . . take an oath to follow the law as charged, and they are expected to follow it." *United States v. Powell*, 469 U.S. 57, 66 (1984). And the Sixth Amendment requires that a case be heard by a "panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). A judge must exclude potential jurors who are unable to set aside preconceptions and to decide the case on the evidence presented in court. *Irvin*, 366 U.S. at 722–23. The judge must exclude a prospective juror where "the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 45 (1980)).

In a capital case, a juror's views about the death penalty may prevent the juror from being impartial and following the law. Thus, the state may exclude jurors opposed to capital punishment because "those jurors might frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Witt*, 469 U.S. at 423. On the other hand, "[a] juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992). The Constitution does not require a finding that the juror would "automatically" vote for or against the death penalty, and the Constitution does not require a showing of bias by "unmistakable clarity." *Witt*, 469 U.S. at 424. If the juror's views on the death penalty would substantially impair the juror's ability to perform the duties of a juror, the judge must remove the juror. *Id.*; *Morgan*, 504 U.S. at 728–29.

The issue of juror impartiality is necessarily one of fact, since it is based largely upon determinations of credibility and demeanor, and the reviewing court owes great deference to the judge who actually observed the juror. *Witt*, 469 U.S. at 429; *Darden v. Wainwright*, 477 U.S. 168, 175 (1986); *Patton v. Yount*, 467 U.S. 1025, 1038–39 (1984). The issue of impartiality cannot be left to the cold record of a trial transcript, and the "inquiry does not end with a mechanical recitation of a single question and answer." *Darden*, 477 U.S. at 176. "This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in

the manner of a catechism." *Witt*, 469 U.S. at 424. Rather, the issue is resolved "based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province." *Id.* at 428. Regardless of the answers given on voir dire, common sense tells us, and experience has proven, that "there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law." *Id.* at 425–26.

The deference owed to state courts is increased under the Antiterrorism and Effective Death Penalty Act of 1996. 28 U.S.C. 2254(e)(1) requires that "a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." The "question of challenge for bias is a 'factual issue' covered by the [statutory presumption of correctness.]" *Witt*, 469 U.S. at 430. The application of the statutory presumption does not require a "written finding, written opinion, or other reliable and adequate written indicia." *Id.* Rather, a

> "transcript of the voir dire [showing that the juror] was questioned in the presence of both counsel and the judge; at the end of the colloquy the prosecution challenged for cause; and the challenge was sustained when the judge asked [the juror] to 'step down.' Nothing more was required under the circumstances to satisfy the statute." *Id.*

2. Proceedings In The Washington Courts

a. Trial Court

Since the prosecutor was seeking the death penalty, before the trial began potential jurors completed questionnaires that included general questions on the death penalty. Jurors who indicated an opposition to the death penalty were questioned individually on whether their views would prevent or substantially impair their ability to follow the court's instructions.

Mr. Deal expressed concerns with the death penalty in his questionnaire. Pet. App. 228a–29a, 235a. Mr. Deal stated he was in favor of the death penalty only if it was proved beyond a shadow of a doubt that a person has killed and would kill again. Pet. App. 235a. As a result of his statement, Mr. Deal was individually questioned regarding his ability to impose the death penalty in Brown's case. During this questioning, Mr. Deal said he believed the death penalty was appropriate only in severe cases. Pet. App. 224a. When defense counsel asked him to explain when he thought the death penalty would be appropriate, Mr. Deal said, "I think if a person is, would be incorrigible and would reviolate if released, I think that's the type of situation that would be appropriate." Pet. App. 228a. Counsel explained that the trial would not involve much testimony on whether Brown might kill again since the alternative sentence was life imprisonment without parole, and counsel asked whether that would frustrate Mr. Deal. Pet. App. 228a–229a. Mr. Deal said, "I'm not sure." Pet. App. 229a. Mr. Deal repeated that he thought the death

penalty was appropriate only in "severe situations." Pet. App. 229a.

The prosecutor then questioned Mr. Deal. Pet. App. 235a. Mr. Deal again said he favored the death penalty only if it is proved beyond a shadow of a doubt that a person has killed and would kill again. Pet. App. 235a. The prosecutor explained that "beyond a reasonable doubt" does not mean "beyond all doubt or beyond any shadow of a doubt," and the prosecutor asked, "would you still require the State to prove beyond a shadow of a doubt that the crime occurred knowing that the law doesn't require that much of us?" Pet. App. 236a. Mr. Deal responded, "I guess it would have to be in my mind very obvious that the person would reoffend." Pet. App. 236a.

Mr. Deal had just learned during the jury selection process that Washington had life imprisonment without parole. Pet. App. 238a. When Mr. Deal previously stated he could impose the death penalty, he had assumed the person would be eligible for parole. Pet. App. 237a–238a. The prosecutor asked whether Mr. Deal could think of a time when he would be willing to impose the death penalty, knowing now the only alternative sentence was life imprisonment without parole. Pet. App. 238a. Mr. Deal said, "I would have to give that some thought. I really, like I said, up until an hour ago did not realize that there was an option of life without parole." Pet. App. 238a. When asked about the idea of the defendant having to kill again, Mr. Deal reiterated that the death penalty was appropriate only in severe situations. Pet. App. 239a.

The prosecutor challenged Mr. Deal for cause, arguing that his statements showed he could impose the death penalty only if the defendant was in a position to kill again. Pet. App. 241a–242a. The prosecutor argued Mr. Deal had not said anything to show he could overcome his belief that the death penalty is appropriate only when it is proved that a defendant will be able to kill again:

> "And if a person kills and will kill again. And I think he had some real problems with that. He said he hadn't really thought about it. And I don't think at this period of time he's had an opportunity to think about it, and I don't think he said anything that overcame this idea of he must kill again before he imposed the death penalty or be in a position to kill again. So, that is my only challenge." Pet. App. 241a–242a

To the request to remove Mr. Deal, Brown's defense counsel said: "We have no objection . . . ." Pet. App. 242a. The judge then removed Mr. Deal based upon the prosecution's request and defense counsel's agreement. Pet. App. 242a. By removing Mr. Deal, the judge implicitly found as fact that Mr. Deal was substantially impaired in his ability to perform the duties of a juror. Brown was subsequently convicted of aggravated first degree murder and sentenced to death.

b. The Washington Supreme Court

On direct appeal, the Washington Supreme Court affirmed the removal of Mr. Deal. Pet. App. 173a. According to the court, "[t]he standard for ruling on challenges for cause in a death penalty

case is whether the prospective juror's views would prevent or substantially impair the performance of that person's duties as a juror according to instructions and the oath taken by jurors." Pet. App. 171a. In applying this standard, the court "gives deference to the trial court's finding that a prospective juror's views on the death penalty will prevent that person from trying the case fairly and impartially." Pet. App. 171a. The reason for this deference is that "the trial judge is in the best position upon observation of the juror's demeanor to evaluate the responses and determine if the juror would be impartial." Pet. App. 171a. The "manner of the juror while testifying is oftentimes more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record." Pet. App. 171a.

Applying these standards, the Washington Supreme Court concluded that the trial court properly exercised its discretion in removing Mr. Deal. The court noted that the "[a]ppellant did not object at trial to the State's challenge of Richard Deal for cause" and that "[o]n voir dire he indicated he would impose the death penalty where the defendant 'would reviolate if released,' which is not a correct statement of the law." Pet. App. 173a. By affirming the trial judge, the Washington Supreme Court also found as fact that Mr. Deal was substantially impaired in his ability to perform the duties of a juror.

The Washington Supreme Court affirmed the conviction and sentence, and subsequently denied Brown's personal restraint petition. *In re the Pers. Restraint Petition of Brown*, 143 Wash. 2d 431,

21 P.3d 687 (2001). Brown did not raise the issue of Mr. Deal's removal in this personal restraint petition.

3. Habeas Corpus Proceedings

a. The District Court

Brown filed a federal habeas corpus petition alleging, among other things, that the trial judge improperly removed Mr. Deal as a juror. The district court rejected this claim. In considering the claim, the district court stated that, "[u]pon habeas review, determination as to individual juror bias in both trial and capital sentencing juries, are factual questions entitled to the presumption of correctness." Pet. App. 73a–74a. Thus, "[a] petitioner must rebut such a finding by clear and convincing evidence. 28 U.S.C. § 2254(e)(1)." Pet. App. 74a. According to the district court,

> "[t]he standard for determining when the court may exclude a prospective juror because of his or her views on capital punishment is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. A juror's bias need not be proved with unmistakable clarity." Pet. App. 74a (citation omitted) (internal quotation marks omitted).

In reviewing the record, the district court noted that Mr. Deal "indicated that the death penalty was appropriate in 'severe' situations (SR 2199), such as when 'a person is, would be incorrigible and would reviolate if released.' (SR

2203–04.)" Pet. App. 77a. Mr. Deal "indicated that he could consider the options of life without parole and death, and could vote for a death sentence if he was 'convinced that was the appropriate measure.' (SR 2216.)" Pet. App. 77a. However, the district court observed that "Mr. Deal also indicated some confusion about the impact of a life sentence without parole and the standard of proof. Mr. Deal stated that he would only impose the death penalty if someone could kill again on parole . . . ." Pet. App. 77a.

The district court concluded that these state court "decisions were not contrary to, or an unreasonable application of, clearly established federal law as established by the Supreme Court." Pet. App. 78a. First, because both "the trial court in excusing the jurors, and the Washington Supreme Court is [sic] addressing Petitioner's claim of improper dismissal, applied [*Witt's*] standard." Pet. App. 78a–79a. Second, "[t]here is sufficient evidence to establish that [Mr. Deal's] views would 'prevent or substantially impair' his . . . ability to carry out the duties imposed on jurors." Pet. App. 78a.

b. The Ninth Circuit Panel Decision

Brown appealed to the Ninth Circuit. The Ninth Circuit granted habeas relief and reversed Brown's sentence, concluding the state trial court erred by removing Mr. Deal as a juror.

According to the Ninth Circuit, "excusing a juror for cause in a capital case is unconstitutional, absent evidence that the juror would not follow the law." Pet. App. 13a. The court concluded that this standard was not satisfied because "[n]owhere did

the court find that [Mr. Deal] would be unable to follow instructions." Pet. App. 13a. Indeed, the Ninth Circuit held that no such finding could have been entered because Mr. Deal "'ultimately stated that [he] could consider the death penalty in an appropriate case.'" Pet. App. 13a (quoting *Gray v. Mississippi*, 481 U.S. 648, 653 (1987)). Thus, "[h]ad there been a finding that [Mr. Deal] was 'substantially impaired' in his ability to follow the law, it would have been unreasonable." Pet. App. 13a–14a

The Ninth Circuit also found the rationale of the Washington Supreme Court "misplaced and insufficient." Pet. App. 14a. This was because Mr. Deal's statement that "he would impose the death penalty where the defendant would be likely to kill again did not exclude the possibility that [he] would vote to impose the death penalty in other circumstances as well." Pet. App. 14a.

The Ninth Circuit did not apply the presumption of correctness for state court factual determinations required by 28 U.S.C. § 2254(e)(1) because it held that the Washington courts made no factual finding. The Ninth Circuit also refused to give any deference to the trial court's ability to observe the demeanor of the witness. The Ninth Circuit held that "demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words." Pet. App. 17a n.8. The Ninth Circuit concluded that Mr. Deal's "clear words were that he could impose the death penalty and would follow the court's instructions; he never said anything to the contrary." Pet. App. 17a n.8. The court concluded that

> "[i]f appellate courts must defer to trial court findings on a transcript such as this because a witness may somehow have contradicted his spoken words through some unknown facial expression or body language, not only is *Witherspoon* a dead letter, but all substantial evidence review of trial court factual findings is obsolete." Pet. App. 17a n.8.

c. Dissent From The Denial Of Rehearing En Banc

The state moved for rehearing en banc. The motion was denied but Judge Tallman, joined by four other judges, dissented from the denial. The dissent focused on two main points. First, that the panel went beyond the limited review authorized by the Anti-terrorism and Effective Death Penalty Act (AEDPA). According to the dissent,

> "under AEDPA, the dismissal must have been both objectively unreasonable in that the state court was not merely wrong, but actually unreasonable, and the state court must have confronted a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrived at a result different from Supreme Court precedent." Pet. App. 26a (citations omitted) (internal quotation marks omitted).

According to the dissent, "the panel has overstepped its authority under AEDPA. Congress surely intended through enacting AEDPA to end the practice by some federal judges of granting habeas relief to overturn state capital cases on rulings that

even the parties did not urge to be erroneous when trying their case." Pet. App. 33a.

Second, the dissent stated that the "opinion impermissibly lowers the level of deference which comity demands that we as a federal habeas court afford state courts in reviewing their decisions and findings of fact." Pet. App. 40a. This "lower standard of 'reasonableness review' severely handicaps a trial judge's ability to go beyond the scope of mere words and phrases taken piecemeal from the entire voir dire process." Pet. App. 40a–41a.

The dissent concluded that the decisions of the Washington courts were not objectively unreasonable. The dissent disagreed with the panel's conclusion that there was no finding of substantial impairment by the Washington courts. According to the dissent "the Washington Supreme Court need not *explicitly* declare that [Mr. Deal] was 'substantially impaired' for its affirmance to count under AEDPA." Pet. App. 38a (emphasis in original). Although the Washington Supreme Court

> "did not incant the words 'substantially impaired' . . . . [b]ased upon the rulings of both the trial and appellate courts, and the record in this case, we can certainly conclude that the Washington courts found appropriate the decision to excuse [Mr. Deal] on the only ground proffered by the prosecutor–that he could not discharge his oath as a juror to follow state death penalty law." Pet. App. 38a.

In reviewing the record, the dissent concluded that Mr. Deal was "confused." Pet. App. 29a. He "wavered back and forth between claiming to

understand what he was being told about when the Washington capital sentencing law applied, yet he reiterated his erroneous belief that death was applicable only for recidivists." Pet. App. 34a. Thus, "[t]he transcript reflects that he seemed easily led by both the prosecution and defense counsel into declaring an understanding that everyone in the courtroom recognized he simply did not have." Pet. App. 34a.

The dissent also focused on the fact that defense counsel did not object to Mr. Deal's removal even though "[d]efense counsel did move in writing for reconsideration of the trial court's dismissal for cause of [another juror.]" Pet. App. 32a. This was important because "[q]uite clearly those who had the opportunity to watch [Mr. Deal's] testimony, including the trial judge, the prosecution, and defense counsel, both during and after questioning him on voir dire, felt that [Mr. Deal] was properly dismissed for cause." Pet. App. 33a.

REASONS FOR GRANTING THE PETITION

This Court should grant the petition and summarily reverse because the Ninth Circuit panel explicitly refused to follow *Wainwright v. Witt*, 469 U.S. 412 (1985), and *Darden v. Wainwright*, 477 U.S. 168 (1986). First, the Ninth Circuit refused to give any deference to the decision of the trial court judge who had the opportunity to observe the juror's demeanor. The court held that no such deference was required if the trial transcript was clear. Pet. App. 17a n.8 ("It is true, as the dissent suggests, that we owe the trial judge deference because of his ability to observe demeanor, but demeanor can only

shed light on ambiguous language; it cannot contradict the witness's clear words."). Second, the Ninth Circuit refused to recognize the trial court's implicit finding of fact that the juror was substantially impaired and to apply the statutory presumption of correctness to that finding. Pet. App. 13a ("Nowhere did the court find that [Mr. Deal] would be unable to follow instructions.").

Instead of following *Witt* and *Darden*, the Ninth Circuit substituted its judgment for that of the trial court. In that situation, it is appropriate for the Court to "exercise [its] summary reversal procedure . . . simply to correct a clear misapprehension of the [law.]" *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004). *Stewart v. LaGrand*, 526 U.S. 115, 118 (1999). The Court should grant the petition and summarily reverse.

1. The Decision Below Did Not Follow *Witt* And *Darden* And Conflicts With Circuit Court Decisions Requiring Deference To The Trial Court

The Ninth Circuit refused to grant any deference to the trial court's ability to judge demeanor stating that "demeanor can only shed light on ambiguous language; it cannot contradict the witness's clear words." Pet. App. 17a n.8. As Judge Tallman explained in his dissent, the panel's decision "impermissibly lowers the level of deference which comity demands that we as a federal habeas court afford state courts in reviewing their decisions and findings of fact." Pet. App. 40a. The panel cites no authority for its assertion that a reviewing court

need not defer to the trial court if it can find a clear statement somewhere in the transcript of the voir dire proceeding. The decision below does not follow *Witt* and *Darden*, and conflicts with decisions of the Third, Fourth, Fifth, Eighth, and Tenth Circuits.

Witt and *Darden* both dealt with the disqualification of a juror because of the juror's views about the death penalty. Both Courts emphasized the need to defer to the trial court judge. According to *Witt*, the "determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism." *Witt*, 469 U.S. at 424. Many jurors "simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear.'" *Id.* at 424–25. This is "why *deference must be paid to the trial judge* who sees and hears the juror." *Id.* at 426 (emphasis added).

In *Darden*, the trial court asked the juror: "Do you have any moral or religious, conscientious moral or religious principles in opposition to the death penalty so strong that you would be unable without violating your own principles to vote to recommend a death penalty regardless of the facts?" *Darden*, 477 U.S. at 178. When the juror responded "'Yes, I have' he was excused." *Id.* The defendant argued that removal was improper because the trial court's question did not state the correct standard. This Court rejected that argument because the trial court, "*aided as it undoubtedly was by its assessment of the potential juror's demeanor*, was under the obligation to determine whether [the juror's] views would prevent or substantially impair the performance of his duties as a juror . . . ." *Id.* (emphasis added)

(internal quotation marks omitted). *Darden* concluded that, "[i]n making this determination, the trial court could take account of the fact that [the juror] was present throughout an entire series of questions that made the purpose and meaning of the *Witt* inquiry absolutely clear." *Id.*

The decision below also conflicts with decisions of other circuits of the court of appeals that follow *Witt* and *Darden*. In *Martini v. Hendricks*, 348 F.3d 360 (3d Cir. 2003), Martini sought to overturn his death sentence, claiming a juror was improperly removed. The juror was asked: "Would you be able to vote to impose the death penalty?" *Martini*, 348 F.3d at 364. The juror responded: "Yes, sir." *Id.* Indeed, the juror repeatedly answered that he could vote to impose the death penalty. *Id.* at 364–65. Under the reasoning of the Ninth Circuit panel, the juror's clear statement eliminated any requirement to defer to the trial court judge. However, the court denied habeas relief. Finding the defendant had failed to rebut the state court factual finding of substantial impairment, the Third Circuit concluded that the trial judge, "who saw and sized up" the juror, was "entitled to a very substantial deference." *Id.* at 367. The Third Circuit could not say "by clear and convincing evidence that the state trial judge . . . was incorrect in his finding." *Id.* at 368.

In *United States v. Barnette*, 211 F.3d 803, 812 (4th Cir. 2000), the court removed a juror who indicated he was "unclear as to his opinion on the death penalty." Similar to Mr. Deal in this case, the *Barnette* juror said he would prefer a life sentence unless the death penalty "was very, very, very, very well warranted." *Id.* Deferring to the trial judge's

"opportunity to observe [the juror] and assess his answers first-hand," the Fourth Circuit ruled the decision to remove the juror "was not clearly erroneous or an abuse of discretion." *Barnette*, 211 F.3d at 812.

In *United States v. Webster*, 162 F.3d 308, 340–41 (5th Cir. 1998), the defendant challenged the removal of a juror who, like Mr. Deal, said she could envision circumstances where she would impose a death sentence. The juror in *Webster* believed capital punishment was a deterrent. *Id.* Under the panel decision below, this would be the end of the inquiry, and no deference to the trial court would be required. However, as with Mr. Deal, the presence of the alternative sentence of life imprisonment raised serious questions about her ability to follow the law. *Id.* Deferring to the trial judge's "face-to-face credibility assessments," the Fifth Circuit found "the whole of her testimony could have left the court with the impression that she favored the death penalty as a theoretical necessity, but would not be able to recommend it." *Webster*, 162 F.3d at 341. The Fifth Circuit ruled the trial court did not abuse its discretion in removing the juror. *Id.*

In *Kinder v. Bowersox*, 272 F.3d 532, 542–43 (8th Cir. 2001), the defendant challenged the removal of jurors who said they could obey instructions and follow the law. Once again, under the panel decision these statements would have eliminated any need to defer to the trial court judge. Despite the jurors' "clear words," the Eighth Circuit deferred "to the trial judge's decisions regarding bias

because the judge's 'predominant function in determining juror bias involves credibility findings whose basis cannot be easily discerned from an appellate record.'" *Kinder*, 272 F.3d at 543 (quoting *Witt*, 469 U.S. at 429). Similarly, in *Clemons v. Luebbers*, 381 F.3d 744, 755 (8th Cir. 2004), Clemons challenged the removal of a juror who clearly said he could impose the death penalty. Denying relief, the Eighth Circuit deferred to the trial judge, concluding "the trial court's firsthand impressions trump the cold record." *Id.* at 756.

In *Sallahdin v. Gibson*, 275 F.3d 1211, 1224 (10th Cir. 2002), the juror first said he could not consider the death penalty, but later said he could consider imposing a death sentence. The juror said he thought the death penalty was appropriate if there were multiple deaths, but he could set aside his personal beliefs and follow the judge's instructions. *Id.* The Tenth Circuit deferred to the trial judge, concluding the finding of bias "turns on the juror's credibility and demeanor—matters which the trial court is in the best position to assess." *Id.* at 1225; *See also Hale v. Gibson*, 227 F.3d 1298, 1318 (10th Cir. 2000).

Witt, *Darden*, and these circuit court decisions all hold that the trial court's ability to judge the demeanor of the juror is entitled to deference. The Ninth Circuit panel below expressly ignored this requirement.

2. The Decision Below Did Not Follow *Witt* and *Darden* And Conflicts With Circuit Court Decisions Requiring A Presumption Of Correctness For Implied Findings Of Fact

The decision below expressly refused to recognize the trial court's implicit finding of fact that Mr. Deal was substantially impaired, and to apply the statutory presumption of correctness to that finding. The court stated that "[n]owhere did the court find that [Mr. Deal] would be unable to follow instructions." Pet. App. 13a. As Judge Tallman explained in his dissent, it was not necessary to "incant the words 'substantially impaired'" to have a finding that Mr. Deal was substantially impaired from performing is duty. Pet. App. 38a.

It is not necessary to have express findings. The Court explained this in *Marshall v. Lonberger*, 459 U.S. 422 (1983), in which the Court discussed its earlier decision *Lavallee v. Delle Rose*, 410 U.S. 690 (1973). In *Lavallee*, "the trial judge likewise failed to make express findings as to the defendant's credibility." *Marshall*, 459 U.S. at 433. *Lavallee* "held that because it was clear under the applicable federal law that the trial court would have granted the relief sought by the defendant had it believed the defendant's testimony, its failure to grant relief was tantamount to an express finding against the credibility of the defendant." *Marshall*, 459 U.S. at 433. Similarly, in this case, if the trial court judge had not concluded that Mr. Deal was substantially impaired from performing his duty as a juror, he would not have excused Mr. Deal.

Not only did the panel decision fail to recognized the implied finding of impairment, it failed to give that finding the presumption of correctness required by 28 U.S.C. 2254(e)(1). This presumption of correctness is required by *Witt* and *Darden*. The Ninth Circuit's failure to follow *Witt* and *Darden* conflicts with decisions of the Third and Eighth Circuits.

This case is "on all fours" with *Witt*. In *Witt*, as in the decision below, the trial court did not enter a specific finding that the disqualified juror was impaired. The Court ruled that the presumption of correctness applied because "the question of challenge for bias is a 'factual issue' . . . ." *Witt*, 469 U.S. at 430. But the defendant argued the presumption of correctness did not apply because "this conclusion was not evidenced by a written finding, written opinion, or other reliable and adequate written indicia." *Id.* (internal quotation marks omitted). The Court rejected that argument holding that the presumption of correctness applied if there was a "transcript of the voir dire [showing that the juror] was questioned in the presence of both counsel and the judge; at the end of the colloquy the prosecution challenged for cause; and the challenge was sustained when the judge asked [the juror] to 'step down.'" *Id.* *Witt* concluded, "[n]or do we think under the circumstances that the judge was required to announce for the record his conclusion that [the juror] was biased, or his reasoning. The finding is evident from the record." *Id.* This Court found it "noteworthy that [the trial court] was given no reason to think that elaboration was necessary; defense counsel did not see fit to object to [the

juror's] recusal, or to attempt rehabilitation." *Witt*, 469 U.S. at 430–31. Similarly, in this case, Brown's defense counsel did not object to Mr. Deals dismissal. Pet. App. 242a.

This case is also "on all fours" with *Darden*. The trial court in *Darden* did not enter any specific findings of fact that the juror was impaired. *Darden*, 477 U.S. at 178. Despite the lack of an express finding that the juror was impaired, the Court held that the "trial judge's determination that a potential juror is impermissibly biased is a factual finding entitled to a presumption of correctness . . . ." *Id.* at 175. And, as in *Witt*, the Court looked to the transcript of the voir dire proceedings to make its analysis. *Darden* also observed that "[n]o specific objection was made to the excusal of [the juror] by defense counsel." *Darden*, 477 U.S. at 178.

The decision below also conflicts with decisions of other courts of appeal. The Third and Eighth Circuits have followed the holding in *Witt* and expressly applied the statutory presumption of correctness to the voir dire transcript. *Martini* v. *Hendricks*, 348 F.3d 360, 363 (3d Cir. 2003) ("A trial court's conclusion that a potential juror would be biased is a factual determination, and it is therefore entitled to a presumption of correctness under 28 U.S.C. § 2254(e)(1)." (Citation omitted.)); *Clemons v. Luebbers*, 381 F.3d 744, 753 (8th Cir. 2004) ("A trial court's finding of death qualification in the voir dire process is a factual determination entitled to the presumption of correctness established in 28 U.S.C. § 2254(e).").

Witt and *Darden* and these circuit court decisions all hold that the implied finding of the trial court, that a juror is substantially impaired, is entitled to the statutory presumption of correctness. The Ninth Circuit panel below expressly ignored this requirement.

3. Under *Witt* And *Darden*, The Decisions Of The Washington Courts Were A Reasonable Application Of Clearly Established Federal Law As Determined By This Court

The Washington Supreme Court concluded the trial judge acted properly in removing Mr. Deal. In light of the state court finding of fact, this state court decision was a reasonable application of clearly established federal law.[1]

Contrary to the Ninth Circuit's conclusion, Mr. Deal's responses during voir dire demonstrated he was substantially impaired in the ability to perform the duties of a juror. Mr. Deal repeatedly

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[1] The Ninth Circuit found the state court decision contrary to *Gray v. Mississippi*, 481 U.S. 648 (1987). Pet. App. 12a-14a. However, the sole issue before the Court in *Gray* was whether the error was subject to a harmless error analysis. *Gray*, 481 U.S. at 657. The *Gray* Court specifically declared there was no need to delve into the intricacies of the *Witt* standard. *Id.* at 658. *Gray* did not involve a state court finding that the removed juror was substantially impaired. Pet. App. 27a (Tallman, dissenting from denial of rehearing (citing *Gray*, 481 U.S. at 653–55)). The trial court decision in this case was not contrary to the holding in *Gray* because the facts in this case were not "materially indistinguishable" from those in *Gray*, and the holding of the trial court was not the opposite of the holding in *Gray*. *Williams v. Taylor*, 529 U.S. 362, 405 (2000).

indicated that he believed a "severe situation" appropriate for a death sentence existed only where the defendant would otherwise be released and kill again. *See, e.g.*, Pet. App. 235a (in his questionnaire, Mr. Deal stated death penalty was appropriate if proved beyond a shadow of a doubt that a person has killed and would kill again); Pet. App. 228a (indicating death penalty appropriate if person would reviolate if released); Pet. App. 228a–229a. (Mr. Deal may be frustrated since the trial would not involve much testimony on whether Brown might kill again); Pet. App. 236a ("I guess it would have to be in my mind very obvious that the person would reoffend."); Pet. App. 238a (Mr. Deal would have to think about whether he could impose the death penalty if the alternative sentence was life imprisonment without parole). The trial court reasonably concluded Mr. Deal was substantially impaired because he could impose the death penalty only if Brown would otherwise be released and kill again.

In Washington, the prosecutor need not prove the defendant will get out and kill again. Proof of such a fact is nearly impossible since the only alternative sentence to death is life without possibility of parole. Wash. Rev. Code § 10.95.030. Instead of considering whether the defendant may kill again, the jury considers "only the statutory question 'Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?'" Pet. App. 189a (quoting Wash. Rev. Code 10.95.060(4)). Because Brown would never be

released under Washington law, and Mr. Deal believed the death penalty was only appropriate where the defendant would be released and kill again, it is reasonable that Mr. Deal could never impose the death penalty in this case. The reasonableness of this conclusion is enhanced by Brown's lack of an objection to Mr. Deal's removal as a juror.

The trial judge had the singular opportunity to assess Mr. Deal's behavior and demeanor, placing the judge in a position far superior to that of the reviewing courts. *Patton v. Yount*, 467 U.S. 1025, 1037–38 nn.12 & 14 (1984). "The trial judge properly may choose to believe those statements that were the most fully articulated or that appeared to have been least influenced by leading." *Id.* at 1039. The judge may accept some of the juror's answers and discredit others. *Patton*, 467 U.S. at 1039. "It is here that the federal court's deference must operate, for while the cold record arouses some concern, only the trial judge could tell which of these answers was said with the greatest comprehension and certainty." *Id.* at 1040. In Brown's trial, "[t]he dismissal was simply a reasonable judgment call made by the only judge who actually saw and heard [Mr. Deal] during voir dire." Pet. App. 28a. (Tallman, J., dissenting from denial of rehearing).

The prosecutor, having heard Mr. Deal's answers and observing his behavior, believed Mr. Deal was substantially impaired. The trial judge, having observed Mr. Deal during voir dire, agreed with the prosecutor and removed Mr. Deal as a juror, implicitly finding Mr. Deal was substantially impaired. Brown's defense counsel, having

witnessed Mr. Deal during voir dire, did not object. In light of these facts, the Washington Supreme Court reasonably concluded that the trial judge properly exercised his discretion in removing Mr. Deal as a juror.

CONCLUSION

For the reasons stated herein, the petition should be granted and the decision below should be summarily reversed.

RESPECTFULLY SUBMITTED.

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